SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000696-001 DT 01/04/2006

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
L. Rasmussen
Deputy

FILED: 01/06/2006

BRENCICK, MARK A

DAVID JEFFREY CRAVEN

v.

ARIZONA DEPARTMENT OF REAL ESTATE (001)

RANDY D DELGADO

OFFICE OF ADMINISTRATIVE HEARINGS

MOTION GRANTED / REMAND TO OAH

The court has had plaintiff's Motion for Leave to Introduce Additional Evidence Pursuant to A.R.S. § 12-910 under advisement. Plaintiff requests an evidentiary hearing as follows:

> [T]he basis for the hearing will be in part to permit plaintiff to present additional evidence to rebut the Department's claim that plaintiff lacks sufficient evidence to rebut the Department's claim that plaintiff lacks sufficient character to possess a broker's license in Arizona. Plaintiff also wishes to present case law that contradicts and/or overrules the case law the Department and the administrative law judge relied upon to determine that a DUI is a crime of moral turpitude. Plaintiff also wishes to introduce evidence of the Department's decision making process and the applicable laws and standards used by the Department in making decisions regarding applications for real estate licenses. Likewise, the evidentiary hearing will allow the plaintiff to present additional relevant and admissible evidence of his good character not presented at the administrative hearing.

Plaintiff's Motion for Leave to Introduce Additional Evidence, pp. 2-3. Defendant opposes plaintiff's request.

A.R.S. § 12-910(A) provides, in relevant part:

> If requested by a party to an action within thirty days after filing a complaint, the court shall hold an evidentiary hearing, including testimony and argument, **to the**

> **extent necessary to make the determination required by subsection E of this section.** The court may hear testimony from witnesses who testified at the administrative hearing and witnesses who were not called to testify at the administrative hearing. [emphasis added]

Rule 10, Arizona Rules of Procedure for Judicial Review of Administrative Decisions, states in part:

> **Rule 10. Admission of New or Additional Evidence**
>
> Any party seeking the introduction of new or additional evidence pursuant to the exceptions contained in A.R.S. § 12-910(A), shall file, prior to the time for filing plaintiff's opening brief, a motion identifying the evidence sought to be admitted and setting forth the appropriate legal authority in support of its admission. The moving party shall also address the application of A.R.S. § 12-911(A)(7)[1] to the party's motion. Any party opposing the motion may file a response thereto.

Judicial review of administrative decisions is and always has been limited in scope. A.R.S. § 12-910(E) very specifically delineates the court's authority in such matters:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

Reading A.R.S. § 12-910 as broadly as plaintiff urges would dramatically alter and expand the scope of judicial review. It would essentially convert judicial review actions into trials *de novo.* Administrative hearings would become virtually meaningless, as the losing party could simply seek to introduce new and better evidence on appeal once it learned of the specific weaknesses in its case or developed new theories. Such an interpretation would also render A.R.S. § 12-911(A)(7) meaningless. Courts do not interpret statutes to contain useless provisions unless no other construction is possible. *Tucson v. Clear Channel Outdoor*, 209 Ariz. 544, 553, 105 P.3d 1163, 1172 (2005).

In *Shaffer v. Arizona State Liquor Board*, 197 Ariz. 405, 4 P.3d 460 (App. 2000), the court noted that, while amendments to A.R.S. § 12-910(A) have "muddied the waters" of administrative law, the judicial standard of review has not changed. The *Shaffer* court explained the relatively narrow application of A.R.S. § 12-910(A):

[1] A.R.S. § 12-911(A)(7) provides that, when a hearing has been held by the agency, the superior court may "remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it appears that such action is just."

> The court, as before, defers to the administrative decision if substantial evidence supports it. If, on the other hand, the court concludes that the new or additional evidence is such that, had it been introduced in the administrative proceedings, no reasonable fact finder would have reached the administrative decision, then the latter is not supported by substantial evidence.

197 Ariz. 405, 409, 4 P.3d 460, 464.

Shaffer also holds that it is the "unusual" case that will warrant the introduction of new evidence in the superior court:

> [W]e conclude that the legislature did not intend to make the superior court an independent trier of fact and that the statute offers a safety net **for the unusual case** in which new evidence, had it been presented in the administrative proceeding, would have changed the decision. [emphasis added]

197 Ariz. 405, 409, 4 P.3d 460, 464.

Plaintiff's proffered new evidence regarding the Department's "decision making process and the applicable laws and standards used by the Department in making decisions regarding applications for real estate licenses" is not appropriate under A.R.S. § 12-910 and *Shaffer*. His proposed additional character evidence, however, is a much closer call in light of the ALJ's Finding of Fact #18, which states:

> Mr. Brencick did not present any witnesses to testify in his behalf; the only character evidence that Mr. Brencick offered into the record consisted of three letters of recommendation. *See* Exhibit 1. Although such letters speak highly of Mr. Brencick, none of the individuals who provided those letters appeared to give testimony at hearing. Therefore, the Department was unable to cross-examine any of those persons as to the basis for their opinions. Consequently, although the Administrative Law Judge admitted the letters into evidence, the Administrative Law Judge gave them only modest evidentiary weight in the determination of this matter.

In Conclusion of Law #3, the ALJ stated, *inter alia:*

> The Administrative Law Judge further concludes that Mr. Brencick's convictions, and the conduct underlying those convictions, are substantial and persuasive evidence that Mr. Brencick is not a person of good character, in violation of A.R.S. § 32-2153(B)(7), and that Mr. Brencick failed to present sufficiently substantial evidence at hearing to refute or rebut that conclusion.

But for Finding of Fact #18, this court would likely deny the pending motion. However, that finding implies that, had the character witnesses been available for cross-examination, the ALJ might well have assigned more weight to their testimony, and plaintiff might have carried his burden of proof in a case that was not by any means "open and shut." It does not appear that plaintiff, who appeared at the agency hearing without counsel, was aware that his witnesses could testify telephonically. Under these circumstances, the court finds it appropriate and just to remand this matter to the Department pursuant to A.R.S. § 12-911(A)(7) to allow additional testimony from plaintiff's character witnesses (which may be telephonic).

IT IS ORDERED granting plaintiff's Motion for Leave to Introduce Additional Evidence Pursuant to A.R.S. § 12-910 to the limited extent described herein.

IT IS FURTHER ORDERED remanding this matter to the agency for additional appropriate proceedings and submission of a supplemental report/recommendation/order. Once the supplemental information is received from the agency, the court will conduct a telephonic status conference with counsel to determine how to proceed.